

# PRIVATISING HUMAN RIGHTS: WHAT HAPPENS TO THE STATE'S HUMAN RIGHTS DUTIES WHEN SERVICES ARE PRIVATISED?

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*[International human rights law has traditionally focused on the obligations of states in fulfilling human rights — including the fulfilment of economic and social rights — through the provision of social services. This article asks how that state-focused approach fits in a world where social services are frequently privatised or contracted out. It focuses on three examples of social service provision, namely, health, education and prisons, and inquires into the obligations of the state and the private operators in relation to these services. What were the state's obligations in relation to these services under the traditional formulation of human rights law? Are the private operators capable of having human rights obligations? Can the obligations shift directly from the state to the private operator? How does the nature of the obligations change? This article concludes that private providers of social services have certain human rights obligations within their respective spheres of activity and influence, but those obligations have a different character than the state's obligations. At the same time, the nature of the state's obligations changes from a duty of action to one of supervision and, where necessary, intervention. The state retains an overarching obligation to guarantee the protection and realisation of the human rights of everyone under its jurisdiction, regardless of the character of the service provider.]*

## CONTENTS

- I Introduction
- II Human Rights Duties of States in Service Provision
  - A Health
  - B Education
  - C Prisons
- III Human Rights Obligations of Private Service Providers
  - A Relationship between Private Actors and International Human Rights Law
  - B Content of Private Human Rights Obligations
  - C Obligations of Private Providers of Health, Education and Prison Services
    - 1 Prisons
    - 2 Health and Education
- IV Conclusion: An Altered State Duty and a Separate Private Duty

## I INTRODUCTION

Under international human rights law, a number of legal obligations are imposed upon states to protect and promote the human rights of those within their borders. Not least among these are obligations to pursue progressive improvement in economic and social rights through the provision of social services such as health and education. The protection of civil and political rights

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is also an important responsibility of the state which needs to be reflected in the exercise of the state's functions.

These human rights obligations were predominantly formulated at a time when the state's clear role included the provision of certain services fundamental to the functioning of society, such as health and education services, employment services, prisons, and water and power utilities. Since that time, many of these state functions have been privatised or contracted out,<sup>1</sup> but their importance to the realisation of human rights remains unchanged. A change in the entity running a prison, for example, does not alter the prisoners' right to be treated humanely. The problem that arises from this global trend is that international human rights law historically vests legal responsibility for human rights in states, including areas where the realisation of human rights depends upon the effective provision of social services. In cases where these social services are privatised, the question arises as to what happens to the state's human rights duties.. That question is the central theme of this article.

This is a somewhat different inquiry to the consideration of the human rights responsibilities of private entities, since privatisation of social services in many cases brings with it a fundamental shift in the method for delivering positive human rights outcomes. This article looks at the human rights duties of states in relation to the provision of social services, and comments on how the privatisation of those services affects the nature of the state's duties. At the same time, it considers whether any of the state's traditional duties are transferred to private operators at the time of privatisation.

The article focuses on three key areas of service provision with significant human rights implications: health, education and prisons. These areas have been chosen as examples of sectors where the nature of existing human rights obligations are quite different, but nevertheless extremely important. Each of these areas has recently seen significant shifts towards provision by the private sector, potentially leaving the status of human rights obligations attached to the corresponding social services in limbo. In Australia, ongoing public debate as to the appropriate balance of public and private sector involvement in health and education provision, as well as the contracting out of some prisons and immigration detention centres to private security companies, illustrates the increasing relevance of these issues. This paper seeks to identify the content of the state's duties under international human rights law with respect to these areas, considering the implications of privatisation for each. It then examines the nature of private service providers' human rights duties and the interrelationship and demarcation between these duties and those of the state. It concludes with an observation of the changing nature of the state's human rights responsibility in line with its changing role in service provision, arguing that both the state and

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<sup>1</sup> For the purposes of this paper, 'privatisation' is taken to mean a process whereby a previously state-run service is transferred to private operation, including operation by non-state civil society organisations, private corporations or other non-state entities. 'Contracting out', for present purposes, is treated as a subset of privatisation, whereby ownership of the facility or service enterprise remains with the state, but the provision of the service is transferred to non-state entities on a contractual basis. For a comparison of and commentary on different definitions of these terms, see Graeme Hodge, *Privatization: An International Review of Performance* (2000) 13–17.

the private operators will bear complementary human rights obligations where responsibility for service provision has shifted to the private sector.

## II HUMAN RIGHTS DUTIES OF STATES IN SERVICE PROVISION

In order to consider whether the state's human rights obligations are altered by the process of privatisation, and whether the private entity taking over the state's service responsibilities also accrues human rights obligations, it is first necessary to ascertain the accepted human rights obligations of the state in the traditional scenario where the state is the social service provider. This part of the article therefore considers the nature of the state's established human rights obligations in relation to each of the three social services being considered: health, education and prisons. In each case, it pays particular attention to the interaction between the state and service providers from the private sector, considering whether the transfer of services to the private provider alters the state's obligations, or the action necessary for those obligations to be discharged.

The character of the state's human rights obligations is frequently described as being three-pronged, comprising an obligation to respect human rights, an obligation to protect human rights and an obligation to promote human rights.<sup>2</sup> The obligation to respect human rights means that the state itself should not violate human rights. The obligation to protect human rights means that the state should use its influence — for instance, its legislative, police and judicial powers — to prevent one private entity violating the human rights of another. The obligation to promote human rights means that the state should constantly strive to improve the level of realisation of human rights. In the case of social services, the state's actions in providing the service, ensuring certain standards are met and making the service accessible often merge together the prongs of respecting, protecting and promoting the relevant human rights. For this reason, and because this article is not intended to be a restatement and classification of the state's human rights obligations, the obligations will be considered in this part in relation to service provision rather than whether they constitute obligations to respect, protect or promote human rights. However, those categories will prove useful in determining the obligations of private entities and precisely where the limits of their obligations should be drawn. Accordingly, the three-pronged approach will be revisited in Part III of this article.

### A Health

The right to 'the enjoyment of the highest attainable standard of physical and mental health'<sup>3</sup> appears repeatedly in international human rights instruments, including the Universal Declaration of Human Rights,<sup>4</sup> the *International Covenant on Economic, Social and Cultural Rights*,<sup>5</sup> the United Nations

<sup>2</sup> See, eg, 'The *Maastricht Guidelines* on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691, 693–4.

<sup>3</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 12(1) (entered into force 3 January 1976) ('*ICESCR*'). This right is hereinafter referred to as the 'right to health' for ease of reference.

<sup>4</sup> GA Res 217A, UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, art 25, UN Doc A/RES/217A (III) (1948) ('*UDHR*').

<sup>5</sup> *ICESCR*, above n 3, art 12(1).

*Convention on the Rights of the Child*,<sup>6</sup> regional human rights instruments in Europe,<sup>7</sup> Africa<sup>8</sup> and the Americas,<sup>9</sup> and treaties aimed at the elimination of racial and gender-based discrimination.<sup>10</sup> There can therefore be little doubt that the right to health is a generally accepted international human rights norm. Indeed, some commentators have suggested that the state's obligation to provide some sort of assistance in relation to health is 'on the way to acceptance' as a norm of customary international law.<sup>11</sup>

The right to health is not to be understood as a right to be healthy,<sup>12</sup> but rather 'as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health'.<sup>13</sup> The Committee on Economic, Social and Cultural Rights ('CESCR') has interpreted states' obligations under the right to health to have a particular emphasis on ensuring access to health care for those who might otherwise be unable to pay:

States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health.<sup>14</sup>

Those core obligations include the obligation 'to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups'<sup>15</sup> and the obligation 'to ensure equitable distribution of all health facilities, goods and services'.<sup>16</sup>

Under the traditional model of state provision of health services, the state's obligations under the right to health are both clear and broad: states must allocate the maximum possible resources towards the goal of universal provision of preventative and palliative health care, paying particular attention to access to services for marginalised groups, such as the poor, geographically isolated communities or cultural minorities. How does this duty translate to a system of private or mixed public-private delivery of health care services?

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<sup>6</sup> Opened for signature 20 November 1989, 1577 UNTS 3, art 24 (entered into force 2 September 1990) ('CROC').

<sup>7</sup> *European Social Charter*, opened for signature 18 October 1961, 529 UNTS 89, art 11 (entered into force 26 February 1965).

<sup>8</sup> *African Charter on Human and People's Rights*, opened for signature 27 June 1981, 1520 UNTS 217, art 16 (entered into force 21 October 1986).

<sup>9</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 17 November 1988, 28 ILM 156, art 10 (entered into force 16 November 1999).

<sup>10</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195, art 5(e)(iv) (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13, arts 11(1), 12 (entered into force 3 September 1981).

<sup>11</sup> See, eg, Oscar Schachter, *International Law in Theory and Practice* (1991) 330.

<sup>12</sup> CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health* UN Doc E/C.12/2000/4 (11 May 2000) ('CESCR General Comment 14').

<sup>13</sup> *Ibid* [9].

<sup>14</sup> *Ibid* [19].

<sup>15</sup> *Ibid* [43(a)].

<sup>16</sup> *Ibid* [43(e)].

For private service providers, the driving motivation is necessarily profit. It therefore follows that a private provider of health services, or indeed any services, will seek to concentrate on areas that provide the most lucrative financial return for the outlay. The specific priorities of the state's duties in the realisation of the right to health, such as the treatment of epidemics<sup>17</sup> or immunisation against infectious diseases,<sup>18</sup> will not necessarily coincide with that economic reality. Even where such a coincidence does occur, it is unlikely to include delivery to marginalised groups as a priority in the absence of government intervention through funding or contractual requirements for cross-subsidisation.

The state's duty to intervene in such a manner is clear in relation to the right to health. CESCR has confirmed that states are obliged to

adopt legislation or take other measures ensuring equal access to health care and health-related services provided by third parties; [and] to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services.<sup>19</sup>

Thus any deterioration in the ability of the most vulnerable members of society to access health care as a result of privatisation from the provision of health care services is likely to constitute a violation of the right to health by the state concerned. Tsemo is even more emphatic, arguing that 'a privatisation initiative that leads to service delivery that is better overall but is static or worse for the poor, can be challenged from a human rights perspective'.<sup>20</sup> The responsibility of the private service provider for any such deterioration is discussed in Part III. As far as the state itself is concerned, it would seem that a contract with a private entity to provide health services would be in violation of the state's obligations in relation to the realisation of the right to health if its terms did not allow the state to intervene and impose restrictions to ensure that the needs of the most vulnerable in society are met.

## B Education

The right to education is similarly widely recognised. It appears in the UDHR,<sup>21</sup> is expanded on in *ICESCR*<sup>22</sup> and *CROC*,<sup>23</sup> and is reaffirmed in numerous international and regional instruments.<sup>24</sup> Like the right to health, the right to education includes an obligation of accessibility, which itself includes requirements of non-discrimination, physical accessibility — which extends to

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<sup>17</sup> Ibid [44(c)].

<sup>18</sup> Ibid [44(b)].

<sup>19</sup> Ibid [35].

<sup>20</sup> Sihaka Tsemo, 'Privatisation of Basic Services, Democracy and Human Rights' (2003) 4(4) *Economic and Social Rights Review* 2.

<sup>21</sup> UDHR, above n 4, art 26.

<sup>22</sup> *ICESCR*, above n 3, arts 13, 14.

<sup>23</sup> *CROC*, above n 6, art 29.

<sup>24</sup> See, eg, *First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 262, art 2 (entered into force 18 May 1954); *African Charter on Human and Peoples' Rights*, above n 8, art 17(1); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, above n 9, art 13.

those in remote areas — and affordability.<sup>25</sup> The obligation of non-discrimination includes a prohibition on ‘sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations’,<sup>26</sup> but allows affirmative action through ‘the adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups.’<sup>27</sup> The obligation of affordability requires that primary education be available free of charge, secondary education ‘shall be made generally available and accessible to all by every appropriate means’, and higher education ‘shall be made equally accessible to all, on the basis of capacity’. Further, free secondary and tertiary education is to be progressively introduced.<sup>28</sup>

While the duty of the state to provide free or affordable education as an option for all is clear, the right to education specifically recognises the role of educational institutions run by religious organisations or other non-government entities.<sup>29</sup> Thus the state has an obligation to provide accessible schooling, but also carries the parallel obligation to allow non-state educational institutions to operate and to ensure the autonomy and academic freedom of those institutions.<sup>30</sup> State duties in relation to the right to education therefore have a dual character not evident in relation to the right to health: the state must monitor the standards of private education and must ensure that accessible and affordable education is available to all, but it must not interfere in the delivery of education by private entities provided those standards are met. It is therefore unlikely that a state could discharge its duty to make education accessible by requiring private operators to provide free schooling to those who could not otherwise afford the fees, rather than maintaining a parallel government education system that is free (in the case of primary school) or affordable (in the case of secondary and higher education),<sup>31</sup> except perhaps where the state provides funding to that private

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<sup>25</sup> CESCR, *General Comment 13, The Right to Education*, [6(b)], UN Doc E/C.12/1999/10 (8 December 1999) (*‘CESCR General Comment 13’*).

<sup>26</sup> *Ibid* [35].

<sup>27</sup> *Ibid* [32].

<sup>28</sup> *ICESCR*, above n 3, art 13(2). It should be noted, however, that *CROC*, which postdates *ICESCR* by 22 years and has been ratified by more states, retains the obligation to make secondary and tertiary education accessible ‘by every appropriate means’, but does not mention that they be provided, progressively, for free: *CROC*, above n 6, art 28(1). This may represent something of a retreat from international consensus on the question of free secondary and tertiary education, but does not diminish the obligation that education be accessible.

<sup>29</sup> *Ibid* arts 13(3)–13(4).

<sup>30</sup> *CESCR General Comment 13*, above n 25, [38]–[40].

<sup>31</sup> The obligation not to ‘interfere with the liberty of individuals and bodies to establish and direct educational institutions’ in art 13(4) of *ICESCR* is subject to art 13(1), which is directed mainly towards the role of education in promoting peace, tolerance and respect for human rights and fundamental freedoms. The obligation to make education accessible is contained in art 13(2) of *ICESCR*, to which art 13(4) is not expressly subjugated, suggesting that state control of fees or exemptions charged by private institutions would constitute an interference in violation of art 13(4).

institution.<sup>32</sup>

Under the right to education the state therefore has a duty to monitor private operators, even though such private institutions might never have been state-owned. The state is obliged to ensure that private education meets the state's minimum educational standards<sup>33</sup> and must ensure that the provision of private education 'does not lead to extreme disparities of educational opportunity for some groups in society'.<sup>34</sup>

Furthermore, the state must ensure that education provided by both the public and private sectors respects other human rights norms. Of particular relevance to schools is the manner in which their students are disciplined. CESCR has declared that corporal punishment is inconsistent with the fundamental guiding principle of international human rights law, 'the dignity of the individual',<sup>35</sup> as enshrined in the preambles to the UDHR, ICESCR and the *International Covenant on Civil and Political Rights*.<sup>36</sup>

The UN Human Rights Committee has determined that corporal punishment violates the prohibition on torture and cruel, inhuman or degrading treatment or punishment, declaring that

the prohibition must extend to corporal punishment, including excessive chastisement ... as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 [of the ICCPR] protects, in particular, children, pupils and patients in teaching and medical institutions.<sup>37</sup>

The European Commission of Human Rights held in the case of *Costello-Roberts v United Kingdom*,<sup>38</sup> in which a very young pupil at a private school received corporal punishment known as a 'slipper', that the state 'has a duty under the [*European Convention for the Protection of Human Rights and Fundamental Freedoms*]<sup>39</sup> to secure that all pupils, including pupils at private schools, are not exposed to treatment contrary to Article 3 of the Convention',<sup>40</sup> which prohibits torture and inhuman or degrading treatment or punishment.

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<sup>32</sup> CESCR *General Comment 13*, above n 25, [40], commenting on the obligation to allow institutional autonomy, provides:

Self-governance, however, must be consistent with the systems of public accountability, especially in respect of funding provided by the State. Given the substantial private investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability.

It is not clear whether such accountability could include preconditions such as limits on or exemptions from fees, however it is submitted that this would be appropriate where State funding is equal to or greater than the amount of revenue foregone by the private provider as a result of the preconditions.

<sup>33</sup> ICESCR, above n 3, arts 13(3)–13(4); CESCR *General Comment 13*, above n 25, [29], [59].

<sup>34</sup> CESCR *General Comment 13*, above n 25, [30].

<sup>35</sup> *Ibid* [41].

<sup>36</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

<sup>37</sup> Human Rights Committee, *General Comment 20: The Prohibition of Torture and Cruel Treatment or Punishment*, as contained in *Report of the Human Rights Committee*, UN GAOR, 47<sup>th</sup> sess, Annex VI, [5], UN Doc A/47/40 (1992).

<sup>38</sup> (1990) 67 Eur Comm HR 216.

<sup>39</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (citation added).

<sup>40</sup> *Costello-Roberts v United Kingdom* (1990) 67 Eur Comm HR 216, 223.

Although that decision related to admissibility of the complaint and did not address the merits, it clearly establishes that the state is obliged to monitor the manner in which private schools enforce discipline, to ensure that human rights are respected.

The state's human rights obligations in the provision of education might serve as a useful model for other areas of service provision that affect human rights, given the long history of non-state provision of education and the state's longstanding obligation to monitor such provision. For social services where non-state provision is a more recent phenomenon, the need for the state to maintain vigilant supervision of service standards and the observance of human rights in the education sector may be instructive. The obligations of private educational institutions themselves are addressed in Part III.

### C Prisons

Prisoners, including those who are detained but have not been convicted of a criminal offence, are entitled to be 'treated with humanity and with respect for the inherent dignity of the human person'.<sup>41</sup> This obligation recognises the particular vulnerability of persons deprived of their liberty — whether in prisons, psychiatric hospitals, migration detention or other form of detention — and recognises the particular need to guarantee all human rights to those persons, 'subject to the restrictions that are unavoidable in a closed environment'.<sup>42</sup> Particular emphasis is placed on the right of prisoners not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. The UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>43</sup> for example, stresses that, in this context:

The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.<sup>44</sup>

Other human rights duties, such as the right to life, also take on special significance in the context of prisoners. The circumstances of imprisonment require that the duty to protect an inmate's right to life extends beyond a mere obligation not to kill, encompassing an obligation to ensure that the inmate does not die in custody.<sup>45</sup>

Further international instruments set out in greater detail the minimum terms for the treatment of prisoners, such as the UN Standard Minimum Rules for the

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<sup>41</sup> *ICCPR*, above n 36, art 10(1).

<sup>42</sup> Human Rights Committee, *General Comment 21: Humane Treatment of Persons Deprived of Liberty*, as contained in *Report of the Human Rights Committee*, UN GAOR, 47<sup>th</sup> sess, Annex VI, [3], UN Doc A/47/40 (1992) ('*HRC General Comment 21*').

<sup>43</sup> GA Res 43/173, UN GAOR, 43<sup>rd</sup> sess, 76<sup>th</sup> plen mtg, UN Doc A/RES/43/173 (1988).

<sup>44</sup> *Ibid*, principle 6.

<sup>45</sup> See, eg, *Dermat Barbato v Uruguay*, Human Rights Committee, Communication No 84/1981, UN Doc CCPR/C/17/D/84/1981 (21 October 1982); *Lantsov v Russian Federation*, Human Rights Committee, Communication No 763/1997, UN Doc CCPR/C/74/D/763/1997 (26 March 2002).

Treatment of Prisoners,<sup>46</sup> which detail the ‘minimum conditions which are accepted as suitable by the United Nations’<sup>47</sup> on such matters as sleeping arrangements, hygiene, bedding, exercise, work, medical treatment, discipline and communication with the outside world, with separate provisions for prisoners under sentence, insane prisoners, prisoners awaiting trial, civil prisoners and persons detained without charge.

The manner in which the state treats these particularly vulnerable members of society in its prisons and detention facilities has long been a major issue in determining a state’s compliance with its international human rights obligations. A number of complaints before the Human Rights Committee have determined that the obligation of humane treatment of prisoners under art 10 of the *ICCPR* and the prohibition on inhuman or degrading treatment in art 7 include, among other minimum standards, the provision of food in sufficient quality and quantity, access to communication or mail, adequate medical care, basic sanitary facilities, basic recreational facilities, minimum cell space and air, provision of a separate bed and clothing that is not humiliating or degrading.<sup>48</sup> Indeed, the Standard Minimum Rules have themselves been referred to so often by the Human Rights Committee in interpreting art 10 of the *ICCPR* that Joseph, Schultz and Castan were led to conclude: ‘it can safely be assumed that the Standard Minimum Rules, and possibly norms in other UN codes, have been elevated to norms of international treaty law in article 10(1) of the Covenant’.<sup>49</sup>

The state has a very clear duty to guarantee all human rights that are not necessarily excluded by the nature of the deprivation of liberty that imprisonment entails. The state therefore retains a duty under international human rights law to ensure the humane treatment of prisoners, regardless of whether the prison (or psychiatric hospital or detention centre for example) is owned or run by the state or by private enterprise. Indeed, it has been claimed that the desire to clarify that the state’s obligations extend to prisons run by non-state entities was one of the key factors in the Human Rights Committee’s decision to issue a new General Comment on the rights of prisoners in 1992.<sup>50</sup> The new comment, replacing the less specific General Comment of 1982, stipulates that art 10 of the *ICCPR* applies

to any one deprived of liberty under the laws *and authority* of the State who is held in prisons, hospitals — particularly psychiatric hospitals — detention camps

<sup>46</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955: ESC Res 663C, UN ESCOR, Annex, Supp 1, [11], UN Doc A/CONF/611 (1955); amended by ESC Res 2076, UN ESCOR, Supp 1, [35], UN Doc E/5988 (1997) (‘Standard Minimum Rules’).

<sup>47</sup> *Ibid* [2].

<sup>48</sup> See especially *Kelly v Jamaica*, Human Rights Committee, Communication No 253/1987, UN Doc CCPR/C/41/D/253/1987 (10 April 1991); *Mukong v Cameroon*, Human Rights Committee, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (21 July 1994); *Smith and Stewart v Jamaica*, Human Rights Committee, Communication No 668/1995, 65<sup>th</sup> sess, UN Doc CCPR/C/65/D/668/1995 (12 May 1999).

<sup>49</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000) 190.

<sup>50</sup> Andrew Clapham, *Human Rights in the Private Sphere* (1993) 109. *HRC General Comment 21*, above n 42, replaced Human Rights Committee, *General Comment 9: Humane Treatment of Persons Deprived of Liberty*, as contained in *Report of the Human Rights Committee*, UN GAOR, 37<sup>th</sup> sess, Annex V, [2], UN Doc A/37/40 (1982).

or correctional institutions or elsewhere. States [P]arties should ensure that the principle stipulated therein is observed in *all institutions and establishments within their jurisdiction* where persons are being held.<sup>51</sup>

Having clarified that the state's obligations in relation to the rights of prisoners extend to privately run institutions, the Human Rights Committee nevertheless has expressed concern about the privatisation of prisons and related services and the consequences for the state's ability to meet its human rights obligations.<sup>52</sup>

In the course of privatising prison management, states often attempt to meet their obligations through the use of contractual conditions as to the treatment of prisoners, the availability of complaint mechanisms for prisoners and similar initiatives. A good example is New Zealand's *Penal Institutions Act 1954* (NZ), which requires private prison contractors to comply with the *Bill of Rights Act 1990* (NZ) and the Standard Minimum Rules in the same manner as if the institution was managed by the state.<sup>53</sup> However, in most cases the contractual obligations of private prison operators are less specific and less closely linked with internationally recognised human rights standards.

This raises the question of whether the private operator should have obligations over and above those in its contract. Irrespective of those obligations, the state is required to monitor private prisons and to intervene whenever necessary to protect the human rights of the prisoners. Therefore, in circumstances such as those prevailing in Victoria's private prisons in the late 1990s, where overcrowding and lack of prisoner safety continued for some time without intervention because of 'a clearly deficient service provider combined with ineffective [state] monitoring',<sup>54</sup> the state would be considered in breach of its obligation to protect prisoners in private prisons, notwithstanding that human rights obligations may also have been breached by the private prison operator.

### III HUMAN RIGHTS OBLIGATIONS OF PRIVATE SERVICE PROVIDERS

#### A *Relationship between Private Actors and International Human Rights Law*

The previous part examined the state's human rights duties in the context of social service provision by the private sector, noting that many of the functions that attract an international legal duty for the state are commonly transferred through the privatisation process. Does this transfer of functional responsibility give rise to a corresponding duty upon the private sector service provider under international human rights law? In order to answer that question, a preliminary

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<sup>51</sup> *HRC General Comment 21*, above n 42, [2] (emphasis added).

<sup>52</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee on New Zealand*, 75<sup>th</sup> sess, [13] UN Doc CCPR/CO/75/NZL (7 August 2002); Human Rights Committee, *Concluding Observations of the Human Rights Committee on the United Kingdom of Great Britain and Northern Ireland*, 58<sup>th</sup> sess, [4], UN Doc CCPR/C/79/Add.55 (27 July 1995).

<sup>53</sup> Human Rights Committee, *Fourth Periodic Report of State Parties Due in 1995: New Zealand*, UN Doc CCPR/C/NZL/2001/4 (17 July 2002).

<sup>54</sup> John Rynne, 'Protection of Prisoners' Rights in Australian Private Prisons' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens: Human Rights in Australian Prisons* (2002) 131, 146.

inquiry is necessary: is international human rights law capable of imposing obligations on non-state actors?<sup>55</sup>

Human rights are by their nature inherent to all human beings by virtue of their very humanity and do not depend on the grace of the state for their existence (as opposed to their effective enjoyment). This principle is confirmed in art 1 of the UDHR, which proclaims: ‘All human beings are born free and equal in dignity and rights’.<sup>56</sup> The existence of the human rights of a person or group is therefore not diminished according to the identity of the prospective violator, nor by the ability of the prevailing legal system to prevent or punish violations, or to promote the positive realisation of those rights.

The system of international human rights law, by contrast, in seeking to define and implement these rights, relies on states as its primary focus for the implementation and protection of the rights it identifies. Only states are parties to international human rights treaties and only states can be the respondent to a complaint under human rights treaties that provide a complaint mechanism. Nevertheless, international human rights law clearly envisages a role for non-state actors in the realisation of human rights. Indeed the UDHR, in proclaiming its list of human rights, declares its intention that ‘every organ of society ... secure their universal and effective recognition and observance’.<sup>57</sup>

Human rights treaties are generally drafted by reference to specific entitlements, for example: ‘Every human being has the inherent right to life ... No one shall be arbitrarily deprived of his life’.<sup>58</sup> It therefore follows that a violation of those rights — in the present example, the arbitrary deprivation of a person’s life — will be a violation of international human rights law whether it is carried out by a government agency, a private individual or a corporation. As Skogly notes, ‘for the victims of human rights violations, the effects are the same whoever is responsible for atrocities’.<sup>59</sup> Everyone — government, individual and corporation alike — is therefore capable of violating human rights.

In order to protect against non-state violations of human rights, obligations under international human rights law must extend to the private sphere, as noted by Clapham:

The application of human rights in the private sphere squarely addresses the effectiveness of human rights protection and so goes some way to answering those critics who point to the empty formal nature of rights. The criticism is often based on the failure of a rights discourse to address *all* forms of oppression and suffering. This is particularly important in an era of powerful corporations,

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<sup>55</sup> This is a highly controversial question in current international legal scholarship and cannot be replayed here in full. This section is limited to setting out the reasoning in favour of finding non-state actors capable of holding obligations under international human rights law. For a more comprehensive consideration of the debate, see Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (2002). For reasoning against the imposition of such obligations, see Ian Brownlie, *Principles of Public International Law* (5<sup>th</sup> ed, 1998) 66; Robert McCorquodale, *Overlegalizing Silences: Human Rights and Nonstate Actors*, (2002) *American Society of International Law: Proceedings of the 96<sup>th</sup> Annual Meeting*, 384.

<sup>56</sup> UDHR, above n 4, art 1.

<sup>57</sup> *Ibid*, preamble.

<sup>58</sup> *ICCPR*, above n 36, art 6(1).

<sup>59</sup> Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001) 51.

ambiguous State intervention, increasing privatization, and racial and sexual violence.<sup>60</sup>

It is contended that private entities are capable of having obligations under international human rights law, even though such obligations might not be enforceable without the assistance of the state. The need for private human rights obligations can be deduced both from the practical necessity, as suggested by Clapham in the above passage, and by logical implication from the expression of rights as an entitlement to be respected by all. The UN committees monitoring the major human rights treaties have recognised that need, while at the same time acknowledging their own limited mandate that allows them to deal only with states. For example, CESCR observed in relation to the right to health that:

While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society — individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector — have responsibilities regarding the realization of the right to health.<sup>61</sup>

The role for non-state actors under international human rights treaties has also been noted in the General Comments of treaty-monitoring bodies in relation to the rights to privacy,<sup>62</sup> freedom from discrimination,<sup>63</sup> freedom of movement,<sup>64</sup> adequate housing,<sup>65</sup> adequate food<sup>66</sup> and education,<sup>67</sup> as well as the rights of women,<sup>68</sup> indigenous people<sup>69</sup> and disabled persons.<sup>70</sup>

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<sup>60</sup> Clapham, above n 50, 353 (emphasis in original).

<sup>61</sup> *CESCR General Comment 14*, above n 12, [42].

<sup>62</sup> Human Rights Committee, *General Comment 16: The Right to Respect of Privacy, Family, Home and Correspondence*, as contained in *Report of the Human Rights Committee*, UN GAOR, 43<sup>rd</sup> sess, Annex VI, [10], UN Doc A/43/40 (1988).

<sup>63</sup> Human Rights Committee, *General Comment 18: Non-Discrimination*, as contained in *Report of the Human Rights Committee*, UN GAOR, 45<sup>th</sup> sess, Annex VI, [9], UN Doc A/45/40 (1990); CERD, *General Recommendation XX on Article 5 of the Convention*, UN GAOR, 51<sup>st</sup> sess, [5], UN Doc A/51/18 (1996); CERD, *General Recommendation XXVII on Discrimination against Roma*, 55<sup>th</sup> sess, Annex V, [28], [31], UN Doc A/55/18 (2000).

<sup>64</sup> Human Rights Committee, *General Comment 27: Freedom of Movement*, 67<sup>th</sup> sess, [6], UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999).

<sup>65</sup> CESCR, *General Comment 4: The Right to Adequate Housing*, 6<sup>th</sup> sess, [14], UN Doc E/1992/3 (13 December 1991).

<sup>66</sup> CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12: The Right to Adequate Food*, [20], [27], [29], UN Doc E/C.12/1999/5 (12 May 1999) ('*CESCR General Comment 12*').

<sup>67</sup> *CESCR General Comment 13*, above n 25, [41], [54] and [59].

<sup>68</sup> Human Rights Committee, *General Comment 28: Equality of Rights between Men and Women*, as contained in *Report of the Human Rights Committee*, UN GAOR, 55<sup>th</sup> sess, Annex VI, [20], [31], UN Doc A/55/40 (2000); CEDAW, *General Recommendation 19: Violence against Women*, 11<sup>th</sup> sess, [9], UN Doc A/47/38 (29 January 1992); CEDAW, *General Recommendation 24: Women and Health*, UN GAOR, 54<sup>th</sup> sess, [14], [15], [17], [31], UN Doc A/54/38/Rev.1 (1999).

<sup>69</sup> CERD, *General Recommendation on the Rights of Indigenous Peoples*, UN GAOR, 52<sup>nd</sup> sess, Annex V, [3], UN Doc A/52/18 (18 August 1997).

<sup>70</sup> CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 5: Persons with Disabilities*, [11], [12], UN Doc E/1995/22 (25 November 1994).

The existence of international human rights obligations for private entities, and the ability to enforce them are, of course, separate issues. With the exception of international criminal law<sup>71</sup> enforcement mechanisms for international human rights law are only permitted to address states, and even then, in the case of the UN bodies, their remedies are limited to chastisement and recommendations. This limitation of international law has led to the development of the doctrine of horizontality, whereby a violation of human rights by one private entity against another can be deemed to be a breach of the state's obligation under international human rights law to protect individuals and groups from abuse by all perpetrators — state and private — or the obligation to investigate or punish the abuse or provide compensation to the victim.<sup>72</sup> This principle was expressed by the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez v Honduras* in the following way:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to the international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [*American Convention on Human Rights*].<sup>73</sup>

The case of *Costello-Roberts v United Kingdom* applied similar reasoning. Respondent states have been similarly held responsible by the European Court of Human Rights for failure to prevent violations of human rights by private actors, inter alia in *X and Y v Netherlands*,<sup>74</sup> where the State was held to have had insufficient criminal law remedies available to a mentally handicapped rape victim, and in *A v United Kingdom*,<sup>75</sup> where the State was held not to have taken appropriate steps to protect the applicant child from excessive corporal punishment administered by his father. The UN Human Rights Committee held the respondent State in breach of its obligations to ensure the right to life under art 6 of the ICCPR in *Herrera Rubio v Colombia*,<sup>76</sup> where the State failed to take appropriate measures to prevent the disappearance and killing of individuals.

As useful as the doctrine of horizontality might be in bridging the gap between a system of international human rights law based on state responsibility and human rights abuses perpetrated in the private sphere, the current global economic trends towards privatisation and the withdrawal of the state from

<sup>71</sup> This includes liability for genocide, crimes against humanity, and war crimes (and, it is envisaged, the crime of aggression) under the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15, arts 5(1), 25 (entered into force 1 July 2002) ('*ICC Statute*'), and similar offences under various ad hoc tribunals. The crime of aggression is to come within the Court's jurisdiction once a provision defining the crime and the circumstances in which the Court has jurisdiction has been adopted: *ICC Statute*, above this note, art 5(2).

<sup>72</sup> Murray Hunt, 'The "Horizontal Effect" of the *Human Rights Act*' (1998) *Public Law* 423, 437.

<sup>73</sup> *Velásquez Rodríguez v Honduras* (1988) Inter-Am Court HR (ser C) No 4, [172], referring to the *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 182 (entered into force 18 July 1978).

<sup>74</sup> (1985) 91 Eur Court HR (ser A) 6; 8 EHRR 235.

<sup>75</sup> (1998) VI Eur Court HR 2692; 27 EHRR 611.

<sup>76</sup> Human Rights Committee, Communication No 161/1983, UN Doc CCPR/C/31/D/161/1983 (2 November 1987).

economic activity, including the provision of social services, ensures that the doctrine alone is insufficient to avoid the difficult question of defining the international human rights obligations of private entities. This is particularly true where the private entity in question operates across state borders, as multinational corporations do, making it extremely difficult to attribute legal responsibility to a single state.

In conclusion, it is contended that private entities can have some form of legal obligation under international human rights law, although the most effective and appropriate manner for enforcing those obligations is a topic for further analysis and debate.<sup>77</sup> The following section therefore turns to the question of the content of the human rights obligations of private entities, particularly the private providers of social services.

### B *Content of Private Human Rights Obligations*

The three-pronged character of the state's human rights obligations was mentioned at the beginning of Part II, comprising an obligation to respect human rights (non-violation), an obligation to protect human rights (prevent others from violating) and an obligation to promote human rights (progressive improvement). The degree to which these formulations of human rights obligations are applicable to non-state actors can be largely determined by logical implication.

The conclusion that private entities have a negative obligation of non-violation of the human rights of others in the course of their ordinary activities is self-evident. The fact that states are expected to prohibit and prosecute such conduct and can be held liable under international law for their failure to do so, as was discussed above in relation to the principle of horizontality, necessarily implies an obligation of non-violation on the part of private entities. If one accepts that international human rights law gives rise to private obligations, there can be no doubt that such obligations include an obligation to respect human rights. CESCR has given an example of a private sector obligation to respect the right to adequate food:

The private business sector — national and transnational — should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.<sup>78</sup>

The obligation to protect human rights requires more analysis, as it entails intervention between other parties, rather than mere restraint on the part of the obligation holder. The ability of a private entity to intervene in order to prevent human rights abuses between private parties is obviously limited by the degree of influence or control it has over the offending third party. However, in limited

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<sup>77</sup> See Frances Raday, 'Privatising Human Rights and the Abuse of Power' (2000) 13 *Canadian Journal of Law and Jurisprudence* 103, for an introductory comparison of various methods for incorporating human rights obligations for private entities into domestic law. For other enforcement proposals, see Jessica Woodroffe, 'Regulating Multinational Corporations in a World of Nation States' in Michael Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 131; and Peter Muchlinski, 'The Development of Human Rights Responsibilities for Multinational Enterprises' in Rory Sullivan (ed), *Business and Human Rights: Dilemmas and Solutions* (2003) 33, 43–50.

<sup>78</sup> CESCR *General Comment 12*, above n 66, [20].

cases that influence can be substantial. This can be clearly observed outside the service sector — for example in the case of a small corporation that relies on a particular large corporation for contracting work, such as a small local bottler of a huge global soft drink brand,<sup>79</sup> or a local factory supplying a global clothing chain — the ability of the larger corporation to insist on observance of human rights norms such as decent working conditions as a condition of the contract is undoubtable, and may even prove a more effective way of preventing human rights abuses by the smaller corporation than reliance on state intervention. On the other hand, the smaller corporation would not be able to influence the larger corporation to observe human rights. The same principle applies in the service sector.

This reality of widely varying influence among private entities vis-à-vis one another makes it necessary to consider the ‘sphere of influence’ of a private entity in defining its obligation to protect the human rights of others, in that it would only be reasonable to impose an obligation to protect others where that entity’s ordinary activities make it capable of intervening or implementing preventative measures, and where such action might reasonably be expected.

In the case of providers of privatised services, the sphere of influence assumes particular importance as private operators move into areas once within the purview of the state. Where a private operator has assumed from the state a degree of control or influence over the activities of persons within their sector — such as the influence of a private prison operator over inmates — the private operator must take some responsibility for the human rights of those persons, including the obligation to prevent them from violating one another’s human rights. It is contended that private entities are obliged under international human rights law to protect human rights within their respective spheres of influence. This is supported by the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law.<sup>80</sup>

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<sup>79</sup> The high level of control exercised by Coca-Cola over an independent bottler in Colombia was the key element in a claim before the US District Court that Coca-Cola was liable for human rights atrocities at the behest of the bottler in *Sinaltrainal v Coca-Cola Co*, 256 F Supp 2d 1345 (SD Fla 2003). However the claim against Coca-Cola was ultimately dismissed. While the legal liability was not established in that case, the complaint describes a situation where control could have been effectively exercised over the bottler in protecting the human rights of the workers, thus demonstrating the kind of leverage discussed here.

<sup>80</sup> Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55<sup>th</sup> sess, Agenda Item 4, [1], UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003) (*‘Sub-Commission Norms’*), adopted by Sub-Commission on the Promotion and Protection of Human Rights, *Adoption of the Report on the Fifty-Fifth Session: Draft Report of the Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2003/16: Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55<sup>th</sup> sess, Agenda Item 7, [52], UN Doc E/CN.4/Sub.2/2003/L.11 (2003). The combination of obligations to ‘secure the fulfilment of’, ‘ensure respect of’ and ‘protect’ human rights equates to an obligation to protect human rights as defined in this article.

The *Sub-Commission Norms* thus advocate not only a duty to respect and protect human rights, but also a duty for corporations to promote human rights. The latter duty is perhaps more controversial, as it requires the obligation holder to take positive measures to improve the realisation of human rights from the status quo.

The state's duty to promote human rights through constant improvement is particularly important in the case of economic, social and cultural rights, the realisation of which is by its nature progressive rather than immediate. This duty is evidenced by the definition of the state's obligations under *ICESCR* in the following terms:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, ... to the maximum of its available resources, *with a view to achieving progressively the full realization of the rights* recognized in the present Covenant by all appropriate means.<sup>81</sup>

Where the realisation of those rights is traditionally achieved largely through the provision of social services, as is clearly the case with respect to the rights to health and education, there is a danger that the point of privatisation will represent a glass ceiling, whereby the continuation of progressive improvement in realisation of the right in question will cease in the absence of an economic incentive for the private operator to fulfil this objective. While it might be arguable that the state's duty to promote human rights includes a duty to provide such incentives to facilitate continuous improvement in privately run social services, the question is whether private entities have an independent obligation to promote human rights, or to continue with the example, whether they would be obliged to improve social services in the absence of economic incentives from the state.

It is problematic to impose an obligation to promote human rights on private entities, as a state's obligation to allocate 'the maximum of its available resources'<sup>82</sup> towards the progressive realisation of economic, social and cultural rights is necessarily inconsistent with the capitalist system and the pursuit of profit. Private enterprise, in order to maximise profit, will naturally allocate the minimum resources necessary to achieve a particular task, reflecting the different societal role played by private enterprise as compared with the state. As our society currently functions, private entities cannot be expected (beyond a moral expectation) to expend their own resources on the general betterment of society.<sup>83</sup>

Nevertheless, there is a clear expectation under international human rights law that continual measures be taken for the progressive realisation of economic, social and cultural rights. The fact that some of these rights depend upon the adequate and equitable delivery of social services, which in some cases are delivered by private providers, suggests that the expectation of their progressive realisation will be frustrated if the privatisation of those services is not

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<sup>81</sup> *ICESCR*, above n 3, art 2(1) (emphasis added).

<sup>82</sup> *Ibid* art 2(1).

<sup>83</sup> While some private entities do indeed improve the human rights situation of the people with whom they interact for a variety of reasons, an empirical analysis of such occurrences ought to be a separate study, as it exceeds the present focus of the examination of obligations under international human rights law.

accompanied by an obligation on the part of the service provider to promote human rights affected by that service. However, it is submitted that obligation must be imposed upon private operators by states as part of their obligation to monitor and enforce human rights, rather than being imposed directly upon private operators by international human rights law. It is perfectly legitimate to require private entities not to violate human rights and to take action to prevent others within their sphere of influence from violating human rights — that is, to respect and protect human rights. On the other hand, positive obligations requiring an ever-increasing level of realisation, and presumably an ever-increasing expenditure of resources, are not appropriate for non-state entities in the contemporary world economy.

In the case of services primarily directed towards furthering the realisation of human rights, such as the provision of health services, a direct duty for private service providers to maintain access to services, particularly among marginalised groups, would be appropriate. This would include at least maintaining levels of access for marginalised groups and continuing affirmative action measures that are already in place, but would not require further measures to be taken to improve access, except where external factors would cause access levels for marginalised groups to fall in the absence of further action. Therefore the content of a private service provider's duty to promote human rights is a duty to take whatever measures are necessary to ensure that the realisation of human rights in relation to that service, particularly in terms of access to services such as health and education, is at least maintained. Of course, this private duty does not diminish the state's obligation to promote all human rights, including those affected by social services, whether by placing contractual conditions on private service providers, by facilitating parallel service provision, or by any other means necessary for the realisation of human rights to be continuously improved.

The conclusion as to the nature of a private service provider's human rights obligations is therefore that it is obliged, within its sphere of operation and influence, not to violate human rights, to prevent others within its control and influence from violating human rights, and to take action (or refrain from taking action) to prevent a regression of the existing level of realisation of the relevant right. While these private obligations mirror the state's obligations to respect, protect and promote human rights, they differ in content in recognition of the different role played by non-state entities. Thus the character of the state's human rights obligations in relation to social service provision cannot be transferred entirely from the state to a private operator, even where the service provision itself is transferred, nor can those obligations be duplicated in their entirety. For this reason, while a private service provider must take responsibility for the realisation of human rights within its field of operation, the state retains concurrent responsibility for the realisation of the same rights within its jurisdiction as a whole and will be held responsible under international law for a failure to enforce the human rights obligations of private operators.

### C *Obligations of Private Providers of Health, Education and Prison Services*

Having defined the human rights obligations of private service providers, this section considers briefly the provision of the three services discussed above,

namely health, education and prison services, and examines how the private service providers' obligations should be practically applied in relation to those services.

## 1 Prisons

Perhaps the most straightforward of these is the case of privately operated prisons and detention facilities. As was noted above, the minimum treatment of prisoners and detainees has been elaborated upon in numerous international instruments, and clearly extends to inmates of both publicly and privately run institutions. The Human Rights Committee made it clear in *Mukong v Cameroon* that the minimum conditions 'should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult'.<sup>84</sup> Arguments relating to the different economic functions of the state and private service providers, as discussed above, therefore cannot be invoked to differentiate between the standards expected of privately run prisons in the treatment of prisoners and those expected of their state-run counterparts. All obligations imposed on states in relation to the treatment of prisoners — in other words, the duty to respect the prisoners' human rights — are therefore equally applicable to private prisons.

There is a similar commonality between state and private obligations in terms of the obligation to protect prisoners from human rights abuses by one another. This is a result of the absolute and enveloping nature of the prison authorities' power and influence over the inmates in their respective institutions. As private prison operators have direct charge over inmates and as it is only through their action or inaction that the rights of prisoners can be directly violated, there is a logical necessity for an independent responsibility on the part of the service providers to do all they can to prevent human rights violations. It was contended above that private entities are obliged under international human rights law to protect human rights within their respective spheres of influence. In so far as a private prison operator's sphere of influence over its inmates is almost absolute, so too is its obligation to protect those inmates from human rights violations at the hands of one another.

Since contracts for the provision of prison or detention services often contain contractual provisions relating to the treatment of inmates, the question arises as to the relationship between such contractual duties and the human rights duties noted here. Where the prison operator's contractual obligations are sufficiently detailed and onerous with respect to human rights, it is possible that the content of the two sets of obligations will overlap and that the private operator need do nothing more than fulfil its contractual obligations in order to also discharge its independent human rights obligations. However, where contracts are not so effective in protecting human rights, private operators should nevertheless be considered to have an independent duty to ensure human rights within their institutions. In that case, the contractual shortcomings may also indicate a failure on the part of the state to discharge its own human rights obligations under international human rights law.

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<sup>84</sup> *Mukong v Cameroon*, Human Rights Committee, Communication No 458/1991, [9.3] UN Doc CCPR/C/51/D/458/1991 (21 July 1994).

## 2 *Health and Education*

Health and education are dealt with together in this section as both are social services that are essential to the realisation of human rights. The two services share key requirements of service quality and accessibility in the realisation of the central right (the rights to health and education, respectively), and raise similar issues in relation to the effect each service has on other human rights.

The right to education is instructive in examining the obligations of private entities operating social services, as the provision of education by non-state entities is expressly envisaged by art 13 of *ICESCR*.<sup>85</sup> The fact that students are granted specific entitlements in relation to their education — for instance nondiscrimination and freedom from corporal punishment<sup>86</sup> — while envisaging that education would be provided by non-state actors constrained only by ‘such minimum standards as may be laid down by the State’,<sup>87</sup> necessarily implies that non-state entities have an obligation to respect and provide those entitlements. Health service providers, similarly, must not only strive to provide the highest possible standard of health care, but must do so in a manner that respects the human rights of their patients, including freedom from discrimination, the right to bodily integrity (including freedom from unnecessary invasive medical procedures without consent),<sup>88</sup> and the right to life, among others.

These obligations, particularly the mandated minimum educational requirements, will often be addressed in the contractual or quasi-contractual arrangement with the state that allows the health or education provider to operate.<sup>89</sup> However, in the same way that prison operators have human rights obligations independent of their contractual obligations, so too do providers of health and education services. The main difference arises in the nature of the sphere of influence of a health or education provider as against a prison. Where the service provider has institutional care of its patients or students, such as in a hospital or a boarding school, the provider’s influence over those persons’ lives will be very high, bringing a corresponding duty to protect their human rights from others within the institution. However, where the level of influence is lower, such as a visiting nursing service or a university, the duty to protect human rights will diminish commensurate with the degree of influence.

The differing forms of service provision in the fields of health and education also give rise to different practical obligations in relation to the central requirement of accessibility to the service. The primary obligation to ensure accessibility to health and education services rests with the state. However, the

<sup>85</sup> *ICESCR*, above n 3, art 13(3)–13(4).

<sup>86</sup> *CESCR General Comment 13*, above n 25, [31]–[37], [41].

<sup>87</sup> *ICESCR*, above n 3, art 13(4).

<sup>88</sup> For example, sterilisation of disabled women without their consent was considered to breach the prohibition on torture and cruel, inhuman or degrading treatment or punishment under art 7 of the *ICCPR*: Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Japan*, 64<sup>th</sup> sess, [31], UN Doc CCPR/C/79/Add.102 (1998).

<sup>89</sup> Depending upon the arrangements in place in a particular state and the specific service in question, educational or health service providers may operate under a contract, or may be required to meet certain criteria to maintain registration or a licence, or to obtain public funding. In the case of privatisation of previously state-run services, the privatisation contract may contain some of the conditions referred to here.

precise measures expected of the service provider will vary according to the circumstances, particularly the mandate conveyed by privatisation. For example, a mandate to provide general health care to a designated region will carry quite different responsibilities to a mandate to set up a private hospital as an alternative to the public system in order to relieve the latter's workload. In the case of the more general mandate, obligations such as affordability, physical accessibility and the appropriate targeting of particular health problems could conceivably be owed by the service provider as part of its obligation to respect, protect and promote human rights within its sphere of activity and influence. In general terms, however, private service providers should ensure that they do nothing that would amount to a regression of human rights realisation in relation to their service, including in terms of accessibility.

#### IV CONCLUSION: AN ALTERED STATE DUTY AND A SEPARATE PRIVATE DUTY

The preceding discussion concluded that private entities have human rights obligations in relation to their areas of operation. In the case of operators of formerly state-run social services, these obligations assume particular importance, as the services themselves are often a vehicle for the realisation of human rights. These obligations are independent from any similar obligations that might be imposed by the state under privatisation agreements or management contracts. They are separate from the state's human rights duties and are of a different character.

The emergence of a private human rights duty does not however supplant the state's duty: 'The State cannot contract out of its responsibility to protect and promote human rights.'<sup>90</sup> Indeed, the *Sub-Commission Norms* stress at the outset that

[s]tates have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights.<sup>91</sup>

In considering the application of human rights provisions of the *South African Constitution*, which are based on international human rights law, Steytler argues that '[t]he changing of [the state's] role from a "provider" to an "ensurer" of services does not deflect the binding nature of ... socio-economic rights obligations'.<sup>92</sup>

Thus the buck continues to stop with the state. The state's duties under international human rights law, including the duty to guarantee civil and political rights to all within its jurisdiction<sup>93</sup> and the duty to apply the maximum of its available resources towards the progressive realisation of economic, social and

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<sup>90</sup> Adam McBeth and David Kinley, 'After Johannesburg: Can Human Rights be Privatised Too?' (2002) 27 *Alternative Law Journal* 292, 293.

<sup>91</sup> *Sub-Commission Norms*, above n 80, [1].

<sup>92</sup> Nico Steytler, 'Socio-Economic Rights and the Process of Privatising Basic Municipal Services under the *Municipal Systems Act*' (2003) 4(4) *Economic and Social Rights Review* 7, 10.

<sup>93</sup> *ICCPR*, above n 36, art 2(1).

cultural rights,<sup>94</sup> remain unchanged. However, in the case of privatised social services, the character of those obligations changes for the state.

The state will have a heightened duty of supervision, ensuring that private entities meet their human rights obligations. CESCR already acts under that assumption in the case of services that are contracted out, for example, requesting Luxembourg to provide information ‘on how it monitors social services provided by private organisations that use public funds, so as to ensure they conform with the requirements of the [ICESCR]’.<sup>95</sup> The Committee on the Rights of the Child has similarly noted that privatisation of services that can affect children’s rights will result in legal obligations for both the private entity and the state, emphasising that

enabling the private sector to provide services, run institutions and so on does not in any way lessen the State’s obligation to ensure for all children within its jurisdiction the full recognition and realization of all rights in the Convention [on the Rights of the Child]. ... This requires rigorous inspection to ensure compliance with the Convention. The Committee proposes that there should be a permanent monitoring mechanism or process aimed at ensuring that all State and non-State service providers respect the Convention.<sup>96</sup>

Thus the treaty-monitoring bodies, with their mandate limited to monitoring human rights compliance by states, are already adapting their approach to take account of the changing nature of the state’s human rights duties, while recognising that the human rights monitoring system needs to evolve further to ensure compliance by non-state actors where they have encroached into human rights-sensitive areas of service provision formerly occupied by the state.

The state needs to ensure that progressive realisation of economic, social and cultural rights continues after the privatisation of the service designed to effect that realisation. This may require the imposition of contractual obligations on the private service provider or the provision of subsidies or financial incentives for the private operator to work towards continual improvement in the realisation of human rights when such a course would not otherwise be profitable. For example, private firms running prisons or detention centres might be offered bonuses under their contracts with the government for facilitating ongoing medical, social or human rights training for their staff, with a view to improving the rights of the inmates.

Where access to the relevant service is an element of the right, as is the case with the rights to health and education, the state has a responsibility to ensure that access is provided to all, particularly those most in need and those most vulnerable, and to ensure that levels of access are continually improved. Again, this may require contractual obligations, subsidies or the like, or may require the state to provide supplementary service to those not served by the private

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<sup>94</sup> ICESCR, above n 3, art 2(1).

<sup>95</sup> CESCR, *Concluding Observations of the Committee in relation to the Third Periodic Report of Luxembourg under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 30<sup>th</sup> sess, [35], UN Doc E/C.12/1/Add.86 (23 May 2003).

<sup>96</sup> Committee on the Rights of the Child, *General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child*, [43]–[44], UN Doc CRC/GC/2003/5 (2003).

operator, ensuring that such service is of a comparable quality.<sup>97</sup> The *Health Legislation Amendment (Medicare) Act 2004* (Cth) and alternative proposals by opposition political parties to minimise ‘out-of-pocket’ expenditure by patients on health care provided by the private sector could fall into this category, and from a human rights perspective, should be judged on their ability to maintain or improve the accessibility of health care to the poorest, sickest and most vulnerable people in Australian society.

Where private operators fail to meet their human rights obligations, the state must be prepared to intervene, for example by terminating the contract if there is one, or by providing redress to the victims of the violation. Failure to do so will result in the state being held responsible under international human rights law for failing to meet its human rights obligations.

Where services have been privatised, the private operator therefore acquires human rights obligations, the nature of which will depend upon the type of service in question and the operator’s sphere of activity. However, the state must retain its overarching human rights responsibility, divided into an obligation to oversee the discharge of the private operator’s obligations and intervene where necessary, and a continuing obligation to guarantee the protection and realisation of the human rights of everyone under its jurisdiction, regardless of the character of the service provider.

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<sup>97</sup> See, eg, *CESCR General Comment 13*, above n 25, [35] in relation to the right to education.